Response and Comment of the

Aerospace Industries Association
Contract Services Association
Government Electronics & Information Technology Association
Information Technology Association of America
National Defense Industrial Association
Professional Services Council

To the Preliminary Recommendations of the Working Groups of the

Acquisition Advisory Panel

Provided in Public Hearing on

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**MULTI-ASSOCIATION COMMENTS ON
PRELIMINARY RECOMMENDATIONS OF THE
SECTION 1423 ACQUISITION ADVISORY PANEL'S
PERFORMANCE-BASED WORKING GROUP**

We have reviewed the findings of the Performance-Based Acquisition Working Group dated October 27, 2005 and we are in agreement. We would like to offer some points to consider when developing your recommendations for furthering the use of PBSA in the federal arena.

Agencies remain unsure when to use PBSA. From the report we understand OFPP is currently undertaking a study, which may yield further intelligence on the extent of agency-wide use of PBSA. We await those results and will offer additional comments upon release of the study. Overall it appears that government agencies not only show a lack of understanding of when to use PBSA, but also how to use it. Specifically, agencies do not seem to understand how to define requirements, write SOW/SOO's, identify meaningful quality baselines and measures, identify effective incentives, and manage the contract and outcomes post-award.

PBSA solicitations and contracts continue to focus on activities and processes, rather than performance and results. To achieve a change in focus toward results, we recommend that definitive and comprehensive guidelines be developed and established government-wide to serve as primary reference source for all government contracting and program management staff. These guidelines would detail how to develop and manage a PBSA in five key areas: objective specifics (result criteria), measurement of baselines and objectives (how and when are they measured), accountability (who is responsible for what), timeliness (when are objectives due), and achievement of objectives (Pass/Fail of result criteria).

We recommend training to be required for contracting staff as well as program managers. Topics should include measures, planning, alignment, accounting, budgeting, motivation, auditing, and reporting. In addition, we recommend a centralized document library for use by contracting staff and program managers. These documents would provide examples of varying types of tasks with sample Performance Work Statements (PWS) and Statement of Objectives (SOO), and industry Best Practices that demonstrate applicability to PBSA.

The panel might also look at the Coast Guard model for creation of performance-based statements of work. The Coast Guard has established a Center to write Performance Work Statements (PWS) and Statement of Objectives (SOO) for other Coast Guard contracting offices. This centralizes the expertise in one place, and the Center avails itself to contracting offices that may only seek requirements for PBSA on an infrequent basis.

We also recommend that the panel look at the way contracting personnel and program staff is evaluated. Is work performance evaluated based on outcomes or on the

mechanics of managing the daily minutia? We suggest that government make sure that work performance evaluations are aligned to encourage use of PBSA to manage results rather than emphasizing managing activities.

We also recommend that the panel look at the way contracting personnel and program staff is evaluated. Is work performance evaluated based on outcomes or on the mechanics of managing the daily minutia? We suggest that government make sure that work performance evaluations are aligned to encourage use of PBSA to manage results rather than emphasizing managing activities.

PBSA's potential for generating transformational solutions to agency challenges remains largely untapped. To develop this potential, we again recommend using training to maximize the benefits. It is also imperative that senior management is involved – both senior management from the project side as well as the contracting office. Senior management leadership and buy-in is critical in a transformational situation as subordinates are being asked to move into new and unknown areas – out of the safety zone.

Within federal acquisition functions, there still exists a cultural emphasis on "Get to Award." While culture encourages the "Get to Award" mentality, the process is also constrained by time and people resources to do the upfront work. To lead a cultural change, senior leadership needs to support the efforts and show commitment by providing additional staffing and scheduling time in procurement planning for market research. Also, to assist the contracting and/or program staff we recommend the designation of an entity to answer questions, such as a PBSA Help Line. Training should also be developed to include best practices, along with help for contracting and program staff to become comfortable with the upfront phase of doing market research and establishing baselines and objectives. Training should be made available in the widest variety of formats, including classrooms and online distance learning.

Post-award contract performance monitoring and management needs to be improved. As in the previous point, senior leadership needs to support the efforts and show commitment through completion. This is a critical phase of the contract in PBSA and has far reaching components, including: verifying that the desired outcomes are achieved, initiating and completing past performance reporting, and financial recognition. The contract performance monitoring should, when applicable, contain interim milestones. Managing the task to interim milestones can lessen the risk to both contractor and government versus waiting until completion of the task.

Most contract incentives are still not aligned to maximize performance and continue improvement. This can be addressed by a combination of training and sharing lessons learned, as well as promoting "outside the box" thinking. Quality contractors are not attracted to negative incentives, and all positive incentives do not have to be monetary. The emphasis should ensure that the overall objectives are met, not just the individual actions performed.

The FPDS Data is insufficient. We support the revamping of the FPDS site through FPDS – Next Generation. Training is also needed for proper coding of contract data.

MULTI-ASSOCIATION COMMENTS ON PRELIMINARY RECOMMENDATIONS OF THE SECTION 1423 ACQUISITION ADVISORY PANEL'S GOVERNMENT-WIDE CONTRACTS AND INTERAGENCY CONTRACT VEHICLES WORKING GROUP

In undertaking its review of Government-wide Acquisition Contracts [GWAC], Interagency Contract Vehicles [ICV] and enterprise-wide purchasing programs [EWPP], the Working Group sought to minimize duplicating similar reviews and to focus on systemic policy issues that they believe were consistent with the Section 1423 charter. The efforts of the Working Group to acknowledge activities and actions that ran concurrent with its own study efforts are to be applauded. Including the activities associated with EWPPs in the Department of Homeland Security and Navy, for example, makes the Working Groups efforts more immediately relevant to the public discussion of multi-user contracts and assisted acquisition services.

The Working Group's decision to focus on four questions to frame their discussions provided a beneficial discipline to their review. The identification of four types of interagency contract vehicles provided a meaningful construct for the analysis of these contract vehicles. However, as seems often to be the case, the discussion of interagency assisting entities failed to distinguish with clarity the availability of some ICVs to both requiring organizations and the assisting entities. The failure to draw clearer lines reflects the ambiguity of thinking that continues to be observed in DOD and select civilian agencies. The Working Group needs to further clarify thinking in this area by clearly separating its discussion of ICVs from the interagency assisting entities.

The use of assisting entities is a business decision that is separate and distinct from the use of ICVs. While some entities do establish contracts specific to their assisted services, and construct them in such a manner as to restrict their use, not all ICVs are inherently burdened with such restrictions. By the same token, assisting entities may avail themselves, on behalf of their client organizations, of these unrestricted ICVs.

The reasons why assisting entities are used are insufficiently explored. For example, the "parking of funds", a benefit commonly attributed to franchise based entities, is at its root a comment on the budget process for funding large, complex and longer term initiatives. This matter seems to be totally overlooked in both the narrative discussions and recommendations. Additionally, the attractiveness of assisting entities as compared to the internal acquisition support of client organizations is alluded to but not fully addressed. While the recommendations properly suggest greater attention is required in maintaining the appropriation status of funds, short shrift is given to the need for discipline of the business decisions client organization exercise when seeking support from assisting entities.

In regard to the Preliminary Recommendations of November 29, 2005, the following comments are offered.

Creation and Continuation of Interagency Vehicles

The Working Group recommendations identify a variety of worthwhile and beneficial steps that need to be taken. We recommend the panel:

1] Make a clear distinction of the panel's short-term objectives from the proposed long-term objectives;

2] Categorize the matters of internal governmental business from those actions requiring public comment and input;

3] Identify specific expectations for the current OMB interagency task force; and

4], Provide an open and ongoing dialogue between industry and OMB on the extent, use and management of interagency contract vehicles.

The business decisions related to the use of assisted service entities should remain within the government as administrative procedures. The matter of immediate and long-term concern to industry in this regard is the consistent application and interpretation of government contract policies and procedures across all procuring activities. The government should establish clear guidelines, if judged needed, concerning fees for assisted services and competition among service providers.

Competition

The Working Group properly notes that competition is beneficial, and the expansion of the Section 803 authority is a move in the right direction towards improving the consistent use of ICVs throughout the federal sector. However, this recommendation needs to be closely coordinated with the recommendations from the Commercial Practices Working Group to ensure there is a consistency of thought regarding items such as commercial items, services, pricing and the use of labor hour/time and material contracts.

Pricing

See Commercial Practices Working Group comments on commercial pricing.

Workforce

The Working Groups recommendations concerning training presume that the use of interagency contract vehicles represent an extraordinary challenge to the competencies of the existing acquisition workforce. While cases can be cited where policies and procedures were violated, the largest percentage of work processed against ICVs has conformed to the generally accepted requirements of competition and documentation.

The training requirements should be transparent to the contract method and vehicle used. In addition, greater emphasis on developing knowledge of industry practices in preparing and pricing proposals is warranted.

The Working Group should consider commenting on and assessing the benefits of Congressman Davis's recommendation concerning re-employing retired 1102s. Re-employment complemented with a meaningful training program for mid-level and recently hired 1102s would be of benefit.

In regard to Workforce issues, the Working Group may want to consider assessing the migration of personnel from one organization to another. In some cases these staffing shifts have had as significant an impact on the capability of an organizations to procure its own requirements as the desire to seek assistance from other organizations.

Other thoughts

a. The panel is recommending "a reauthorization of each vehicle using similar criteria after some appropriate period consistent with the nature or type of the vehicle.

And the "Need to develop criteria that are distinct from criteria used in making individual contract renewal or options decisions.

Comment: This appears to be a recommendation that would require an "ICV Program Executive Officer" along with the centralization of the use, approval and data collection of ICVs. At this time we do not feel there is evidence of a compelling need to create a centralized organization that oversees the evaluation, usage, and effectiveness of these vehicles. Further, this potentially could shift more resources to staffing and elevate decisions to ICVs, adding layers of management oversight with little or no benefit.

Decentralized execution on these vehicles offers maximum responsiveness to customer's needs. Additionally, contract vehicle that does not add value will not be used and not be renewed. We recommend any criteria developed in assessing contract or option renewal should be guidelines, and not directive in nature.

b. While we agree in principle on the need to have a government wide database of ICVs, the execution is difficult and a long-term goal at best. FPDS_NG may have the capability to provide good information to enhance strategic sourcing solutions, but the decision-making should be made at the Agency level, not at the OMB level. Both of these comments lend itself to a potential ICV Lead at OMB, slowing down an extremely streamlined process.

MULTI-ASSOCIATION COMMENTS ON PRELIMINARY RECOMMENDATIONS OF THE SECTION 1423 ACQUISITION ADVISORY PANEL'S ETHICS WORKING GROUP

Since its first meeting in February of 2005 the Panel and its Working Groups have made various references to internal controls, standards and ethics. In anticipation of the Panel's future discussion on these matters we would like to offer some thoughts and observations for your consideration.

The most important point that the industry group would like to make to the Panel as it considers recommendations regarding ethics is that regulation or law cannot modify some behavior. All of the recent ethical lapses reported in the media were incidents where the perpetrators knew the laws and regulations and knew that their actions were a violation of the trust placed in them as either representatives of the government or persons doing business with the government. No new laws would have changed their actions or altered their guilt. The Defense Science Board Task Force on Management Oversight in Acquisition Organizations in its Report of March 2005 noted that acquisition professionals should not be encumbered with more rules and regulations given the complexity and conflicting world of law, regulations and practices that currently exist. The Panel noted more rules and regulations would not prevent a determined individual from illegal behavior. While the review was internally focused its conclusion is applicable to industry as well. More is not better it is simply more.

When considering the Acquisition Advisory Panel's suggestion that government ethics standards for government activities should be applied to contractor personnel, it is important to note that, across the private sector, companies that serve as government contractors already have systems in place that address ethical standards and behavior for their employees. The Defense Industry Initiative [DII] on Business Ethics and Conduct, which made a presentation to the Panel on May 15, 2005, is an organization representing a number of these firms.

In light of recent ethics scandals, companies have developed an increased level of sensitivity to ethical standards when working with government agencies. Just as government agencies have systems in place with rules and regulations that hold their employees to a high level of ethical standards; the private sector has implemented similar systems. Companies have enforced internal policies that are in line with, and are often more restrictive than, those established by government agencies. Employees are required to comply with these policies at all times, even when working as a contractor for an outside agency. Companies have established programs for their employees to inquire about potential ethical issues and to report ethics violations. In addition, companies provide extensive training to employees about ethical behavior - in particular for those employees who work with government agencies or may come in contact with government officials.

If the Panel is going to actively pursue and consider issues associated with ethics and standards, then we encourage you to consider both the recommendations of the Defense Science Board and the Defense Industry Initiative's Tool Kit in your deliberations. One speaks to the Federal work environment, the other to the private sector. They represent complementary perspectives on creating work cultures that reinforce the high values expected of employees. Neither encourages more rules or regulations; what exists is sufficient to address the concern. Both call for leadership, and greater attentiveness to the high-risk areas that they commonly share and those matters particular to role in their business relationships.

It is not necessary for contractor personnel to be over-regulated by government ethics standards. Contractor personnel are already subject to the ethics standards required of them by their employers and by the contracts through which they work for government agencies. In addition, they must manage the high demand placed on them in response to constant procurement reforms and the need for continued knowledge of changing market conditions, industry trends and technical details.

Alternatives should be considered to determine how ethics issues and violations could be prevented. Private sector entities should continue to educate their employees about ethical practices and standards when working with government agencies. In particular, private companies must address ethics issues such as conflicts of interest, revolving door issues, and misuse of information or authority and impartiality concerns. Companies should make government agencies aware that this training is provided to their employees. Government agencies should reinforce private-sector education by offering agency/project-specific awareness training to contractor personnel.

Rather than over-regulating contractor personnel, ethical violations can be prevented through education, increased monitoring and the enhancement and enforcement of private sector regulations.

MULTI-ASSOCIATION COMMENTS ON PRELIMINARY RECOMMENDATIONS OF THE SECTION 1423 ACQUISITION ADVISORY PANEL'S SMALL BUSINESS WORKING GROUP

On November 10, 2005, the Small Business Cross-cutting Working Group of the Section 1423 Acquisition Advisory Panel released a draft background and issue statement to provide background information on the contributions of, and federal agency reliance on, small business in federal contracting.

The paper discusses the Working Group's two major areas of examination: (1) the extent to which Federal services acquisition strategies are structured to afford small business participation on the prime contract level; and (2) the adequacy of guidance for utilizing small business contracting methods against multiple award task order contracts, including government-wide agency contracts and the Federal Supply Schedules.

On June 14, 2005, the Working Group published an initial set of issues and findings for further consideration. On December 16, 2005, the Working Group published its preliminary set of nine recommendations addressing the two major areas of its examination.

This paper summarizes the multi-association's comments on the Working Group's preliminary recommendations.

Recommendation #1: Provide explicit regulatory guidance on discretion and flexibility to select appropriate small business contracting methods based on agency small business goal achievement.

As the Working Group's November background material noted, there is inadequate guidance available to the contracting community in deciding which of the myriad of different laws providing small business preferences is applicable to an acquisition. The priority to be assigned to various small business preferences is enmeshed in policy and political balancing when deciding how to solicit and award contracts. For example, Congress recently was unable to establish a priority for HUBZone awards over 8(a) awards; the statutory authority to make sole source awards to Alaska Native Corporations or service-disabled, veteran-owned small businesses has provided agencies with enhanced flexibilities and further exacerbates the priority preferences.

The Working Group proposes to add an additional criterion to be taken into account in the determination of the appropriate small business contracting method – the agency's success in meeting each of the its small business goals. As the Working Group's November background material noted, most federal agencies have achieved some of their goals, but no federal agency has met its goal in three small business categories: woman-owned, HUBZone, and service-disabled veterans.

While we support the goal of clarifying the regulatory guidance regarding the contracting officers' discretion to achieve agency small business goals, the current mixture of statutory and administrative priorities add a significant policy issue to further reorienting individual agency actions.

Recommendation #2: Propose a regulatory amendment specifically prohibiting or limiting the use of cascading procurements.

As the Working Group noted in its November background paper, there is no statute or regulation that precludes a cascading procurement, although there is no statute or regulation providing guidance on its use either. However, since the November report was published, Congress included in Section 816 of the fiscal year 2006 National Defense Authorization Act a modification of the Senate-passed provision that requires the Secretary of Defense to issue guidance generally prohibiting DoD's use of "tiered evaluations" of offers for contracts and task orders applicable.

The Acquisition Reform Working Group's comments to the conferees on the acquisition policy issues in the House-Senate NDAA conference recommended making the Senate's original provision applicable government-wide. In addition, several associations have written to OFPP Acting Administrator Burton urging OFPP to issue policy guidance prohibiting the use of cascading as an evaluation technique.

Thus, we strongly support this recommendation.

Recommendation #3: Require a systems review and if necessary upgrade of FPDS-NG to ensure that it provides agencies real-time access to goal achievement data.

Recommendation #4: Require agencies to report to FPDS-NG specific data on contract bundling.

The Federal Procurement Data System (FPDS) is the government's only comprehensive database of government contract awards. In 2003, GSA awarded a contract to establish the FPDS-Next Generation database. While there have been numerous transition issues and agencies have been having difficulty submitting fiscal year 2005 procurement data, FPDS-NG remains the sole government-wide database of procurement actions.

Regrettably, the design of FPDS-NG creates limited flexibility to provide agencies, the Congress or the public with current, complete and accurate information on an agency's procurement actions. The Government Accountability Office and industry have raised concerns about various aspects of FPDS-NG. Beyond FPDS-NG, the government has finally launched its initial operating capability on an electronic subcontracting reporting system –E-SRS—that is designed to capture contractors' subcontracting awards.

Similarly, congressional direction requires agencies to report to the FPDS information on contract bundling, but as the Working Group's November report stated, there appears to be a combination of misapplication of the rules by federal agencies and a failure to timely report information to FPDS.

We support a comprehensive review of FPDS-NG capabilities and of department and agency ability to input data on a real-time basis, including an analysis of agencies' ability to identify and report on contract bundling. This analysis should occur before any policy changes are made.

Recommendation #5: Amend the governing definition of "contract bundling" to provide a simpler and less subjective definition.

Recommendation #6: Require creation of a government-wide bundling database or central repository of best practices for unbundling contracts and mitigating the effects of contract bundling.

As the Working Group noted, contract bundling and contract consolidation are not new. In 1997, Congress provided a statutory definition of "bundling" that has been implemented in the FAR with requirements that an agency perform certain market research and other procedures. A subsequent act added additional procedures before an agency may "bundle" requirements over certain dollar thresholds (referred to as "substantial bundling"). However, as the Working Group highlighted, in calendar year 2000 the Defense Department issued guidance to its contracting officers on policy and procedure to address contract bundling.

No civilian agency (nor OFPP, for that matter) has issued guidance to civilian agency contracting and program offices on best practices to implement the statute. Thus, we strongly support creating a government-wide database of best practices for understanding the statutory and regulatory requirements relating to "contract bundling" (as defined in the statute) and for mitigating its effects.

Several associations have been meeting regularly with the Defense Department's Office of Small Business to further identify appropriate, updated guidance that can be issued to contracting officers, small business advocates and industry, to better understand the statutory and regulatory requirements. We recommend that those efforts be continued on a government-wide basis, possibly under the auspices of OFPP.

In addition, Congress has imposed on DoD an additional set of procedures when the Department proposes to use "contract consolidation." DoD has issued limited guidance in the DFARS to implement this statutory requirement.

As the Working Group acknowledges, the government's own data has been inconsistent, inaccurate, or missing, thus raising questions of the extent to which contract bundling (as defined in the statute) is actually occurring. In addition, as the Working Group noted, "contract bundling" (as defined in the statute) is not prohibited

provided the contracting officer undertakes the predicate procedural reviews and makes the appropriate determination that such bundling is in the best interest of the agency. Finally, the Government Accountability Office has acknowledged that agencies have broad flexibility, within the requirements of both the Small Business Act and the Competition in Contracting Act, to use "contract bundling" in limited circumstances.

Thus, until these predicate steps are taken, we do not support amending the 1977 statutory definition of "contract bundling" at this time.

Recommendation #7: Encourage development of a government-wide training module targeting acquisition team members and program managers to acquaint them with the value, benefits and requirements of contracting with small business.

We support this recommendation.

Recommendation #8: Provide guidance on the practice of reserving prime contracts for small business in full and open multiple award procurements to ensure greater consistency and transparency in the application of small business contracting requirements to such procurements.

Recommendation #9: Amend governing regulations to clarify the application of small business contracting mechanisms to orders against multiple award contracting vehicles.

As the Working Group's November paper noted, the data suggests that small businesses have been able to compete for and obtain multiple award IDIQ contracts and subsequent orders and that many agencies have taken the initiative to "reserve" one or more prime contract awards for small business concerns under solicitations that were competed as "full and open" opportunities. By and large, these agency initiatives have gone unchallenged. Thus, while we do not oppose providing guidance on the practice of agencies "reserving" prime contracts for small business in full and open competitions, we believe agencies are already familiar with the practice and are taking advantage of appropriate opportunities. A current example is the Department of Homeland Security's solicitation of its information technology systems procurement (EAGLE) where some (unspecified) number of awards in each of the major categories of work solicited on a full and open basis will be "reserved" for small business.

However, with respect to the recommendation to amend the regulations to clarify application of small business contracting mechanisms, the Working Group has not stated the outcome it desires. The November paper notes that Congress required the Defense Department to address the issue of competition for all businesses when it enacted Section 803 of the fiscal year 2002 National Defense Authorization Act requiring that DoD provide a fair opportunity to compete for task orders to (1) all contract holders on a multiple award contract and (2) all contract holders on a GSA

Schedule or less than all contract holders on a GSA Schedule provided that (a) at least three bids are received or (b) if less than three bids are received, the contracting officer documents in the file the steps taken to obtain at least three bids. The Working Group also highlighted the Section 803 requirements that may, in fact, prevent DoD from limiting order competitions to small business concerns.

As part of the fiscal year 2006 National Defense Authorization Act, the Senate proposed (Section 851) to extend the "Section 803" authority government-wide while at the same time clarifying the authority of federal agencies to address the issue of small business participation in task and delivery order contracts. However, this provision was not included in the final conference version.

Many in industry are opposed to expanding DoD's "Section 803" requirements government-wide, particularly to the GSA schedules programs. Others are concerned about undercutting the "fair opportunity" language for all contract holders.

Before we take any position on recommended revisions to the regulations, we recommend that the Working Group, and the Panel, clarify the goal to be achieved with any such revision and then seek further public comment.

MULTI-ASSOCIATION RESPONSE TO PRELIMINARY RECOMMENDATIONS OF THE SECTION 1423 ACQUISITION ADVISORY PANEL'S COMMERCIAL PRACTICES WORKING GROUP

Overall[1] we interpreted the thrust of this Working Group's "preliminary recommendations" to (i) exclude certain types of services from FAR Part 12; (ii) resurrect the discarded notion that unless a uniform price is set by the market, commercial products or services must be procured under the non-commercial rules which would subject the purchases to TINA, audits, and standard government rights in intellectual property; (iii) reintroduce, or add new, complex and counter-intuitive elements to the definition of commercial item; (iv) create differing categories of commercial services that seem unrelated to the commercial nature of the services; (v) establish a new barrier to commercial firms selling to the government as a solution to getting more such firms involved by expanding government authority to require companies to supply "direct labor rates, overhead and profit;" and (vi) reducing a contracting officer's flexibility to tailor a FAR Part 12 contract's terms and conditions to ensure that they are consistent with customary commercial practices. In short, the Working Group's preliminary recommendations seem to manifest an unsupported and unwarranted opposition to the commercial procurement regime that is a cornerstone of the last decade of procurement reform. We discuss these concerns in detail below.

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[1] CAVEAT TO MULTI-ASSOCIATION RESPONSE TO RECOMMENDATIONS:

The preliminary recommendations provided on December 19, 2005, unlike other Working Groups of the Panel, were issued without any narrative summary of the examination of the issues, explanation of the problems identified, why they are considered problems and, finally, why the proposed recommendations would solve the problems as identified and would be the best solution. Industry has been told that there has been sufficient discussion of these points by others in previous meeting to draw conclusions, but we are concerned that there is no statement of findings and the basis for those findings from the Working Group itself. Since industry groups had presented information to the Panel from a variety of sources on more than one occasion, we feel the need to state our disappointment that the Working Group's recommendations as a whole do not seem to reflect consideration of many of the positions previously expressed by many groups. Finally, we also note that the Working Group fails to offer any recommendations that are intended "to amend or eliminate any provisions in such laws, regulations, or policies that are unnecessary for the effective, efficient, and fair award and administration of contracts for the acquisition by the Federal Government of goods and services." Based on Section 1423(c)(2)(C), Duties of the panel, we would have expected the panel to recommend, for example and at the very minimum, a review of the long list of clauses in FAR 52.212-5, applied by a PCO to FAR 12 prime contracts, with a view toward eliminating as many as appropriate to ensure consistency between prime contracts, and the appropriate few clauses that are required to be flowed down to subcontractors. Thus these comments as offered must make significant suppositions and assumptions about the thinking and rationale of the Working Group that led to these recommendations and should be taken in that context. It also should be noted that given the Working Group's lack of any analysis in its preliminary recommendations, we found it impractical to provide as much analytical support for these comments as we would like.

Before addressing the details, however we note that the Working Group's "preliminary recommendations" will undermine years of government and industry efforts to expand the government's access to commercial products and services. Less than five years ago, DoD issued its handbook to encourage acquisition and support of commercial items: *Commercial Item Acquisition: Considerations and Lessons Learned* (July 14, 2000). The cover letter by Jacques Gansler, then Under Secretary of Defense (Acquisition, Technology & Logistics), and Art Money, then Assistant Secretary of Defense (Command, Control, Communications & Intelligence), emphasized that the industrial base was changing as was the pace of change, and the processes and strategies for fielding and supporting weapons and business systems also had to adapt.

The benefits of the new acquisition policy to expand the use of commercial items in DoD systems were many then and nothing has happened to change that assessment. These benefits include: capitalizing on the technical advances made in the commercial marketplace; leveraging of the technology investments of the private sector; reducing cycle times for products, leading to faster insertion of new commercial technologies into government systems and lower life cycle costs; and getting the greater reliability and availability provided by many commercial products over government-unique counterparts. The handbook also emphasized the importance of reviewing requirements to determine where they can best be satisfied by commercially available products or where the requirements can be altered to enable DoD to leverage the commercial sector.

These strategies are still critical today. The budget pressures of today are as great as they have ever been and will get more severe in the years ahead; the number of large prime contractors focused on defense work is smaller than ever; and the number of platforms is lower than ever and the associated, aggregate costs higher. Thus the importance of attracting new competitors into the government marketplace is growing while the pool of companies having the uniquely required systems is decreasing. The preliminary recommendations cite the importance of focusing on the need for competition. Having more commercial firms interested in doing business with the government remains the most effective and efficient way to increase that competition.

The Working Group's preliminary recommendations fail to explain what problem(s) these recommendations, if adopted, will solve. Given the benefits listed above of doing business with commercial companies, and all the protections already existing in statute and regulation, including the government's access to information other than cost and pricing data and GAO audit rights, the problems are hardly self-evident. The Working Group should strive to further streamline acquisition policies for commercial products and services. Instead, the Working Group's preliminary recommendations would create additional disincentives for commercial business to contract with the government by subverting the definition of commercial items; interjecting the question of price reasonableness into the determination of what is a commercial item; limiting the situations when the government can avail itself of commercial items; and increasing a potential commercial offeror's risk of being subjected to costly government audits and severe civil and criminal sanctions.

RECOMMENDATION #1

The Working Group's preliminary Recommendation #1 proposes to revise the definition of "commercial item" so that:

> (i) the definition only includes "items for which the commercial market establishes prices";
>
> (ii) the definition is clarified regarding the "discretion of government agent to require information other than certified cost or pricing data for determination of fair & reasonable price"; and
>
> (iii) "commercial services" are defined separately from commercial item.

For the reasons set out below, we strongly believe that these preliminary recommendations are misguided and would constitute a significant step in the wrong direction.

Bullet #1 Revise the definition of "commercial item" to only include items for which the commercial market establishes prices.

It is unclear to us why some continue to confuse the determination of what is a commercial item with questions or issues surrounding price. The definition of "commercial item" in FAR 2.101 states that what is a "commercial item" depends on the type of product or service at issue and to whom it is sold. The price or other terms of the bargain under which it is sold is not determinative of whether the item is commercial. The issue of "price" is properly analyzed in the context of whether the price of an offered commercial item or service is fair and reasonable to the government. If the price is not fair or not reasonable, the government should not buy the item. But it unnecessarily confuses the pricing issue to say an item whose price is too high is not "commercial." Price reasonableness issues need to be addressed using price analysis tools after the commercial item determination is completed.

We agree that the definition of "commercial item" should be revised, but not in accordance with the Working Group's preliminary recommendation. We strongly oppose any attempt to further instill price considerations into the definition of commercial item. This definition already improperly includes, in our view, some price-related considerations that have for years been a source of confusion.[2] These factors, as discussed below should be eliminated.

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[2] Ralph C. Nash and John Cibinic, *Postscript IV: Defining Commercial Services*, 14 No. 8 Nash & Cibinic Rep. ¶ 39 (discussing the confusion pertaining to what is a "market price" as it relates to the "stand-alone services" portion of the FAR's definition of "commercial item").

Bullet #2 "Clarify discretion … to require information other than certified cost or pricing data for determination of fair & reasonable price"

Nothing in the Working Groups recommendations shows that existing provisions located at FAR 12.209 and FAR 15.403-3 fail to provide contracting officers with sufficient guidance for determining whether the price of a commercial item or service is reasonable. In particular, FAR 15.403-3(b) provides:

> (b) ***Adequate price competition***. When adequate price competition exists (see 15.403-1(c)(1)), generally ***no additional information is necessary to determine the reasonableness of price***. However, if there are unusual circumstances where it is concluded that additional information is necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror. In addition, the contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches (emphasis added).

Accordingly, only in unusual circumstances should a contracting officer need to inquire as to what is or is not a contractor's "commercial price." Adequate competition in almost all cases sufficiently addresses the issue. *See* FAR 15.403-1(c) (providing that adequate price competition exists generally when "[t]wo or more responsible offerors, competing independently, submit priced offers that satisfy the government's expressed requirement.")

If adequate price competition is lacking, the FAR provides additional guidance. First, FAR 15.403-3(a)(1) permits the contracting officer to obtain pricing information from sources other than the offeror, and then to obtain information from the offeror itself when the other sources prove to be inadequate. The FAR encourages agencies to use the detailed guidance set out in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide, which is located at http://www.acq.osd.mil/dpap/contractpricing/vol1chap3.htm - 3.3.

Second, FAR 15.403-3(c)(2) provides the following additional *statutorily-based* guidance specific to commercial items:

> (2) Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).
>
> (i) The contracting officer must limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.
>
> (ii) The contracting officer must, to the maximum extent practicable, limit the scope of the request for information relating to

> commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.
>
> (iii) The Government must not disclose outside the Government information obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).

The government already has adequate authority to request information other than cost or pricing data. The troublesome problem has been contracting officers requiring more data than necessary, thus necessitating repeated letters clarifying the order of priority for obtaining sufficient information to demonstrate price reasonableness. We believe that this is an issue of providing contracting officers and those that support them with the right training, resources and tools to make use of market research, historical cost trend analysis, etc., to be able to arrive at a price reasonableness conclusion.

As indicated by the above-cited FAR provisions and Government Contract Pricing Guide, the Working Group has not demonstrated that a need exists to "clarify discretion of government agent to require information other than certified cost or pricing data for determination of fair & reasonable price."

Bullet #3 Separate commercial services from commercial item definition.

Rather than creating separate definitions for "commercial item" and "commercial service," we believe that the definition of "commercial item" should be simplified to remove the current artificial distinctions between commercial goods and commercial services. Our primary concern with the definition of "commercial item" is how that definition applies to stand-alone services (*i.e.*, subsection (6) of the FAR definition). The language as included in FAR 2.101 provides the following "sub-definition" regarding stand-alone services:

> (6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved.

The terms "catalog price" and "market price" are separately defined.

The sub-definition for stand-alone commercial services has long been a source of confusion in the acquisition community.[3] Although there are many issues created by this definition, we will concentrate on only a few for the Panel's consideration.

First, as suggested by our discussion above, the requirement that the services be sold "competitively" in the commercial marketplace should have no bearing on whether the service is "commercial." For example, if a supplier provides a unique service on a non-competitive basis to several private entities because competition is non-existent, the fact that competition does not exist for the service does not change the fact that the service is sold in the commercial market and, therefore, would commonly be thought of as "commercial." This issue demonstrates one of several ways in which the current definition for stand-alone services *already* mixes price reasonableness issues with what characteristics define commercial services. In our view, whether a service is sold competitively or non-competitively in the commercial market is irrelevant if the price offered the government is reasonable. In those situations where the agency cannot determine if a price is reasonable, it may require commercial pricing data to help make a price reasonableness determination. This aspect of the process should not be definitional but is better addressed in the FAR procedures dealing with price reasonableness determinations.[4]

Second, the proposed new definitional requirement that for an item to be commercial the "commercial market establishes prices" is vague, has very little, if anything, to do with whether a service is commercial in nature, and is clearly too restrictive if the intent is to more broadly apply the "established catalog or market prices" criteria. It has been well chronicled by Professors Nash and Cibinic, and others, that the definition of "market price" has always been a source of significant confusion. Moreover, the "established catalog" criteria fail to reflect that many types of professional services, including professional IT-related services, are sold at fair prices in the commercial marketplace without using an "established catalog" price. Commercial companies who do not use catalog pricing are either foreclosed from the government market or required to change to catalog pricing. The impracticality of catalog pricing partly reflects the frequent need to tailor services from one project to the next and the dynamic nature of pricing in commercial companies. Whether a service provider maintains a catalog price for a particular service or can establish a "market price" is wholly unrelated to whether the work to be performed is sold in the commercial market; that is, whether the service is a commercial service. As is the case with the competitiveness issue addressed above, the heart of the issue here is one of price reasonableness. . When the government does conduct a competition (including a competition using Federal Supply Schedule procedures), and receives competitive offers for services sold in the

[3] Ralph C. Nash and John Cibinic, *Postscript IV: Defining Commercial Services*, 14 No. 8 Nash & Cibinic Rep. ¶ 39 ("One of the continuing puzzlements in the Government contracting process is the interpretation of the definition of stand-alone services . . .").

[4] FAR 12.209 (entitled ("Determination of Price Reasonableness"); FAR 15.403-3 ("Requiring Information Other than Cost or Pricing Data").

commercial market, the question is whether the government should rely on that competition or whether some other mechanism is needed. Such issues have no bearing on whether a service is commercial in nature and the Panel should take the opportunity to make this clear. [5]

The requirement that stand-alone services should be based on "established catalog" or "market prices" to qualify as a commercial item appears to be based on a combination of two factors. First, when the Section 800 Panel recommended the original definition of "commercial item" in the early 1990s, the Panel indicated it had insufficient data to assess what obstacles existed regarding the procurement of stand-alone commercial services. Therefore, the Panel chose not to address the issue.[6] Second, Congress appears to have mimicked the language then existing in the Truth in Negotiations Act ("TINA") when it passed "FASA". In 1996, however, when the Clinger-Cohen Act removed the "established catalog" or "market price" language from TINA so as to exempt all "commercial items" from the government-unique requirements of TINA, it did not remove this language from 41 USC §403(12)(F). The Panel should recommend it do so and treat separately any mechanism needed to assure price reasonableness.

To address these issues, we recommend the adoption of a simplified definition of "commercial item" that places all commercial services on par with commercial supplies. The current definition causes confusion and otherwise poses an unnecessary obstacle to the government's acquisition of commercial services. To clarify, the following revisions (with additions indicated by underlining and deletions indicated by struck text) to FAR § 2.101 are recommended, with a corresponding revision to the statutory definition:

> Commercial item means—
>
> (1) Any item, <u>including any supply or service</u>, other than real property, that is of a type customarily used by the general public or by non-<u>G</u>overnmental entities for the purposes other than <u>G</u>overnmental purposes, and—
>
> (i) Has been sold, leased, or licensed to the general public; or
>
> (ii) Has been offered for sale, lease, or license to the general public;
>
> ****

These revisions are simple and straightforward, and place commercial services on the same footing as any other commercial item. Stand-alone services that clearly are commercial should not be subject to government-unique rules and requirements that

[5] See 11 No. 7 Nash & Cibinic Rep. ¶ 34 ("There is no rational reason for using these pricing-related terms as criteria for determining whether the procurement procedures and terms and conditions permitted for other commercial items would be permitted for stand-alone services.").

[6] *Postscript: Defining Commercial Services*, Nash & Cibinic Report, July 1997.

have long been inapplicable to other types of commercial acquisitions.[7] Put simply, if a service is offered in the commercial marketplace or is of a type that is, that service has demonstrated market acceptance, and the service should not be defined other than as a "commercial item." The panel should then separately consider the role "established catalog or market prices" needs to play, if any, to determine whether pricing is fair and reasonable. We submit that only when there is no competition for the government contract would there be a need for catalog or market prices to be considered.[8] However, the taxpayers' interests are protected in this regard because the FAR already adequately provides for procedures to ensure that prices are fair and reasonable when competition cannot be obtained.

There are differences between services and goods, but it is not clear what the Working Group's recommendation regarding separate treatment of commercial services is intended to accomplish, what the separate treatment would be, or how separate treatment would improve commercial acquisitions. Until the Working Group explains this recommendation it is impossible to analyze the rationale behind its position.[9]

RELATED UNRESOLVED ISSUES #1

Bullet #1 "Pricing of new products where they are commercial in nature but market forces have not yet established pricing or terms of offering"

This seems to largely repeat the first bullet of Recommendation #1. An item is a commercial item if it is of a type offered or sold to the public. The pricing analysis should be a secondary step, not part of the definition. We hope that this is not suggesting re-imposition of the requirement (deleted nearly a decade ago) for "substantial sales to the general public." Second, it is not clear what "terms of offering" are. Third, the FAR allows commercial items that are "of a type" to qualify as commercial items. Again we hope that the goal is not to eliminate any commercial items that are "of a type", further limiting the government's access to the latest cutting edge products that are evolving from commercial items.

Bullet #2 Establishing price when the government is the predominant buyer and prior government contracts establish "market price."

[7] *See generally* FAR Subpart 12.5 ("Applicability of Certain Laws to the Acquisition of Commercial Items").

[8] 14 No. 8 Nash & Cibinic Rep. ¶ 39 ("We…believe that the difficult FAR definition [of stand-alone commercial services] may be impeding the full use of the commercial item procedures for procuring services.").

[9] The commercial item definitions (taken directly from FASA) lumps both supplies and services together under "commercial items." However, even a casual reading of the definition should make clear that paragraphs (1) through (4) are addressing supplies while paragraphs (5) and (6) clearly cover services .

It is again not clear what problem the Working Group is attempting to solve. To reiterate, the nature of an item as being a commercial item should not turn on price reasonableness evaluations, but rather whether the item meets the definition of commercial item. The separate price analysis should examine the circumstances of sales under prior government contracts to determine if those sales give a reasonable basis for determining the current price fair. If so, the law should allow award to be made. If not, other mechanisms should be used to determine a fair price. But we reiterate our recommendation to make the price analysis separate from the commercial item definition.

Bullet #3 Pricing complex commercial transactions (e.g., an aggregation of commercial items and commercial services with performance based objectives).

The basis for the Working Group's preliminary recommendation is again unclear. What is a "complex" transaction and how does aggregating commercial items and services, or using performance-based objectives, change the nature of a transaction? Is the Working Group suggesting some aspect of complex commercial transactions cannot be conducted using existing FAR Part 12 clauses and processes? Detailed price analysis guidance in the FAR and elsewhere provides substantial insight into how to price complex transactions. Also, there is training available at Federal Acquisition Institute and the Defense Acquisition University. This may well be a training and implementation issue, not a regulatory or legislative issue.

Bullet #4 "Commercial" divisions or sectors that sell only to the government.

This point appears to reflect a concern that some "commercial" contractors set up separate "government" divisions to sell just to the government, but sell their products or services as "commercial items" under FAR Part 12. This concern fails to recognize that the only way for some companies to do business with the government is by setting up these separate divisions. The goods and services they offer are the same, but the companies chose to use different business entities because of the government-unique requirements – like cost-accounting standards - and other additional burdens imposed on those selling to the government. For example, the services of the systems analyst or network architect offered by the federal division would be exactly the same type of service offered by the commercial division, but the federal division would have specific systems (cost accounting, invoicing, security, personnel, etc.) that comply with government contract requirements. In the case of products, the federal division would source Trade Agreements Act-compliant product, while the commercial division would provide the same product with the same specifications without concern for compliance with government contract requirements for compliance with "Buy America" or "Free Trade Agreement" countries. Section 1208 of FASA set up commercial contracting to encourage the treatment of intracompany transfers as subcontracts to maximize the government's access to commercial items produced by the commercial divisions of the contractors. Any recommendation that would inhibit companies from structuring themselves so they are able to contract with the government will undermine government access to commercial items and decrease competition.

RECOMMENDATION #2

The Working Group's preliminary Recommendation #2 proposes to revise the definition of "commercial item" so as to define "commercial services" separately. The Working Group's recommendation would distinguish among (i) performance-based services, (ii) services associated with installation, operation, or maintenance of commercial items, and (iii) consulting services. Also, agencies would be required to acquire commercial services competitively under FAR Part 12 or "[p]roceed under FAR Part 15 for non-competitive acquisition of services." We strongly oppose this recommendation.

As indicated in our comments to the Working Group's preliminary Recommendation #1, instead of creating separate definitions for "commercial item" and "commercial service," the definition of "commercial item" should be simplified to remove the current artificial and counter-intuitive distinctions between the definitional components for goods and services. These distinctions are confusing and serve no purpose when one considers the FAR's price reasonableness and other provisions that ensure that the government receives fair and reasonable terms.

Bullet #1 Distinguish among (i) performance-based services, (ii) services associated with installation, operation, or maintenance of commercial items, and (iii) consulting type services.

The Working Group has not explained the basis for recommending distinctions among services based on how they are described, if they are associated with commercial products or are "consulting type services." Neither the impact of the separate definitions nor how these distinctions might improve the procurement of commercial services is explained. Indeed, as stated in the Multi-Association Task Force Report on Service Contracting, dated May 17, 2005 and submitted to the Panel, industry has addressed the issue of whether there is need to develop a listing of the dominate categories of services, and ultimately, determined that services could simply be broken into two components, commercial services and non-commercial or developmental services – no separate listing of categories is needed beyond that.

Bullet#2 Require competition for the acquisition of commercial services under FAR Part 12
Bullet #3 Proceed under FAR Part 15 for non-competitive acquisition of services

The Working Group again fails to explain what it contemplates by proceeding under FAR Part 15. Does it seek to have all of the rules and regulations that apply to non-commercial item acquisitions apply to non-competitive commercial service acquisitions? For example, would commercial services acquired using non-competitive procedures be subject to the non-commercial item intellectual property rules? Is it advocating repeal of the exception these services now have under Truth-in-Negotiations Act?

Also, the preliminary recommendations would create another issue if the intent were to preclude use of FAR Part 12 procedures where a competition is conducted, but only one bidder/offeror responds. If this is the case – which is not clear - the recommendation would fail to recognize that competitiveness is achieved when each offeror prepares its proposal, assuming, as it must, that there are other bidders (whether or not there are other bidders). If there is only one bidder, ascertained after the fact, it does not diminish the competitiveness of the proposal that was prepared without that foreknowledge. More importantly, in many instances a commercial company would not be able to accept a FAR Part 15 contract following a proposal based on FAR Part 12, because it would typically lack the necessary infrastructure (for compliance with TINA, CAS, etc.) and could fundamentally alter its business case for submitting the proposal. This kind of rule would essentially equate to a "bait and switch" which would negatively impact the government ability to draw upon the expertise and solutions offered by commercial services providers.

If the Working Group has price reasonableness considerations on its mind, we request that they explain how the FAR's pricing provisions set out in FAR 12.209 and FAR 15.403-3 as they relate to commercial items are inadequate. We believe that these provisions, which take an incremental approach to obtaining desired data based on the data's availability, strike a reasonable balance and when followed, achieves the government's objective of obtaining fair and reasonable pricing. The Working Group has supplied no basis for thinking otherwise.

RELATED UNRESOLVED ISSUES #2

The Commercial Services Working Group states under "Related Unresolved Issues #2" that:

> Some vendors simply will not sell commercial services under Part 15.
>
> Solution: Expand government authority to require information other than certified cost of pricing data, e.g., direct labor rates, overhead, and profit, etc.?

This "solution" implies that the existing authority to request such information is not sufficient but fails to explain the basis for that implication. In fact, the "Solution," is exactly one of the significant reasons some vendors will not sell to the Federal government under FAR Part 15 procedures. They refuse to submit to audits and the consequent costs of retooling and maintaining their commercially adequate accounting systems to meet substantially different government-unique accounting standards. Integral to this assessment is the risk of severe civil and criminal liability for failure to meet these unique government standards. Expanding the government's rights to demand data will decrease the likelihood that commercial companies will want to do business with the government.

There is no separate method of pricing prescribed in FAR Part 12. The pricing of all negotiated contracts is performed under Part 15. The government's two methods of pricing are: price-based, as measured by what others paid for same or similar services; and, cost-based, as measured by the costs of performance plus a reasonable profit/fee. Some vendors simply will not sell commercial items, including supplies and services, using the cost-based pricing method. As Congress understood when it enacted FASA and later the Clinger-Cohen Act, commercial companies do not need the business processes required to generate detailed contract specific, cost based data including labor rates, overhead rates, allowable costs and profit margins, because it is not required in the commercial marketplace. Congress also felt compelled to limit the government's ability to request cost or pricing data in 10 USC §2306a and 41 USC §254b because of some contracting office's practice of obtaining such data when not necessary. The Working Group here seems to be seeking to revert to these practices.

The government at FAR 15.403-3 has the responsibility and the authority to require "information other than cost or pricing data," as that term is defined at FAR 2.101 if the Contracting Officer cannot otherwise determine the price is fair and reasonable. See FAR 15.403-3(c). Perhaps additional training on market research and other price analysis tools may be beneficial if there is an indication that government officials are not fully utilizing the existing authorities. We are not aware of any significant information suggesting the present authorities are not adequate.

While the recommendation does not say so, it may be seeking post-award audit rights. The government clearly has *pre-award* audit rights over "information other than cost or pricing data" (see FAR 52.215-20 and FAR 52.215-21), so industry can only assume that any concern lies with *post-award* audit rights over such data. Ever since the passage of FASA, some associated with inspector generals and audit offices have complained over the loss of such access to records and audit rights. Just recently, an advance notice of proposed rulemaking (ANPR 2005-N01) was published by GSA that would expand the GSA IG's post-award audit rights to proposal data, that is, defective pricing audits (47 Federal Register 12167, March 11, 2005). Industry expressed very strong negative reaction to that proposed rule for the following reasons (see public comments to the ANPR posted by GSA at http://www.acqnet.gov/GSAM/gsamproposed.html:

- Post-award audit rights over proposal data is not a customary commercial practice;
- Emphasis should be placed on *pre-award* audit rights over proposal data;
- No such action should be taken until GSA reforms its MAS pricing policies and practices, which have clearly not kept pace with the evolution of the MAS program; and

- Significant concerns exist with respect to the GSA IG's (and VA IG's) adherence to the Government Auditing Standards issued by the Comptroller General.

The Working Group has not provided any analysis that addresses these points or shown why the Panel should undertake to concurrently address issues GSA is now been struggling with for nearly a year. It would seem that it would be more appropriate for the Working Group to let the GSA ANPR take its own course rather than make it an issue for the Section 1423 Panel's deliberations.

Finally, if the Working Group wishes to impose defective pricing remedies on all contracts for commercial items, it is seeking an unwarranted expansion of the Truth in Negotiations Act (TINA), which since its inception in 1963 has always excepted contracts based on catalog or market prices. It would also require repeal of the changes Congress made to TINA under FASA and the Clinger-Cohen Act.

OTHER RECOMMENDATIONS

Bullet #1 Standardize basic contract terms for Part 12 contracts rather than relying on each vendor's proposed terms (e.g., payment, termination, remedies for breach, warranties, acceptance, etc.)

We believe that further efforts to standardize the basic contract terms for Part 12 would be counterproductive. FAR clause 52.212-4 -- Contract Terms and Conditions -- Commercial Items – is working. The government was not able to create acceptable standard commercial contract terms and conditions for any industry before the adoption of FAR Part 12 put a stop to these misguided efforts. Imposing government terms (even if considered to be "commercial") is contrary to the very nature of commercial contracting, which is to rely on the market place to establish the terms, and which vary from vendor to vendor and often between transactions. Imposing uniform government terms would also completely undermine the commercial price, which is based on the seller's commercial terms. Any material change in the allocation of risk in the seller's commercial contract will invalidate the seller's offered commercial price. As a result, the government's experience prior to FASA was it often could not acquire commercial products and many more businesses than today were not willing to do business with the government.

The stated intent of FAR Part 12, and FASA which it implements, is to procure commercial items, and to establish acquisition policies more closely resembling those of the commercial marketplace. (FAR Part 12) One of the common complaints from PCOs in the pre-FASA days was that the FAR mandated use of clauses that materially departed from commercial practices. Then the PCO had little flexibility to adapt contract terms to the commercial market place conditions. Moreover, commercial firms were simply unwilling to deal with the complexities of the many standard government contract

clauses. As a result, FASA called for the use of "standard commercial terms and conditions." Part 12 implemented this Congressional mandate by requiring use of terms and conditions that are "customary" in the market place. FAR 12.301 instructs PCOs "to the maximum extent possible" to use federal clauses only when required and otherwise to use clauses "consistent with customary commercial practice." PCOs use FAR clause 52.212-4, which reflects commercial practices, but may tailor it "to adapt to market conditions for each acquisition." (FAR 12.302(a)).

Furthermore, refusing to accept the standard terms of the industry or the standard terms of the commercial offeror would invalidate the commercial price. The price is based on the allocation of risk in the seller's standard commercial contract; and any change in that allocation will result in a change in the price. "Standardizing" any of the terms mentioned by the Working Group--payment, remedies, warranty, termination, and acceptance—affects the contract allocation of risk. The regulatory regime recognizes that commercial item prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. For example, if warranty periods are standardized to one year, then companies whose commercial pricing is based on the costs of a 90-day warranty will be at a cost disadvantage. Conversely, companies with an 18-month commercial warranty will have the benefit of not funding the warranty for the additional 6 months. The effect of the recommendation would be to reverse FASA.

FAR 12.402 currently contains provisions for acceptance. The government always has the right to refuse acceptance of nonconforming items. The Working Group presents no rationale for changing this provision and we see none in the record. We recommend that the acceptance language remain as stated in the FAR and that contracting officers continue to have discretion to define acceptance.

FAR 12.403 currently contains provisions for termination. The government always has the right to terminate a contract for commercial items either for the convenience of the government or for cause. The Working Group presents no rationale for change and the record reveals none. Again, we recommend contracting officer discretion in cases of termination with no changes to Part 12.

In short, the impact of this part of the Working Group's recommendations, if implemented, would be to drive commercial vendors away from government contracting and government prices up. Nowhere does the Working Group articulate what benefits it hopes to achieve through these changes.

We also note that FAR Case 2000-305, "Commercially Available Off the Shelf Items" mandated by Section 4203 of the FY 96 Defense Authorization Act (FARA) has yet to be implemented in the FAR. The law required defining a list of provisions inapplicable to COTS purchases. Instead of seeking to overturn over a decade of Congressional policy, the Working Group and the procurement community would be better served by recommendations designed to facilitate access to COTS products.

Bullet #2 Provide statutory authority for indemnification of contractor for third party claims arising out of government use of commercial items or service.

The reason for the Working Group's inclusion of this point is not clear to industry. However, indemnification can be generally a valuable tool, particularly when the government intends to use a commercial item in an unusual, high-risk application, like anti-terrorist technologies. The SAFETY Act was enacted to create a mechanism to address contractors' liability for selling anti-terrorist technologies to the government. We do not believe that the SAFETY Act has been effectively applied, however. We also note PL 85-804 indemnification exists and is available to apply in many situations, but agencies are extremely hesitant to invoke it. We would support further efforts to more effectively implement these authorities and even new statutory indemnification authority but cannot ascertain from the current recommendations what is intended or why. We would not, however, endorse indemnification if it were to be imposed in exchange for non-standard industry requirements. Such a condition runs the risk of resulting in a worse situation.

Bullet #3 Require TINA data for noncommercial modifications of commercial items (the greater of $500K or 5% of item value).

This recommendation could seriously limit the use of commercial items and services. It is inappropriate for the government to enter into a contract for a commercial item and then in its midst, issue a modification that exceeds a threshold that ensnares the contractor in TINA. TINA compliance is not easy even for traditional government contractors who have built systems to gather and update the required data under a traditional government contract. To expect a commercial contractor to be able to comply with TINA is unreasonable and the very reason many commercial firms refuse traditional government contracts and virtually all companies that undertake both government and commercial work have separate commercial and federal divisions. For commercial work, the overhead to meet TINA and other government unique requirements adds no value. But without establishing such expensive and cumbersome systems, a contractor cannot comply with FAR Part 15 requirements and the failure to comply could result in allegations of fraud and potential financial and reputational losses.

We hope that this recommendation is not a reaction to the well-publicized tanker lease deal, but without the Working Group's reasoning we can only speculate. Artificial thresholds will likely limit the government to essentially COTS-only supplies and services, and eliminate use of FAR Part 12 for acquisition of commercial items with government-purpose modifications that, in context, are only minor. Minor variants to products are common commercial practices and the government benefits from Variants by having access to the latest technology. Recently and in response to the tanker lease deal, Congress directed tightened controls on modifications and DoD is in the process of implementing those changes. This panel need not address the issue and

certainly not without much more study resulting in articulated rationales that can then be subject to public comment.

Government has made it clear that it wants access to commercial items, as well as items of a type that evolve from those same commercial items to meet unique government needs; modifications of a type customarily available in the commercial marketplace; and minor modifications. This includes the engineering support to make the minor modifications to maximize access to commercial processes and technologies. Requiring cost or pricing data for such modifications will shut the door to acquiring modified commercial items from the original equipment manufacturer. The government will have a basic commercial item that can never be upgraded, may not be supportable, and may not be able to meet government unique requirements that could be accommodated by a modification. There is no obvious reason how the government is better served by a self-imposed requirement that the government hire a second contractor to make "non-commercial" / government-purpose modifications.

Bullet #4 – Reaffirm benefits of and preference for competition.

The Competition in Contracting Act and the implementing regulations make clear the preference for competition. Standards that define when exceptions can and cannot be applied are also very well established. To the extent any issues remain, regarding the preference for competition and when it can and cannot be excepted, then we would suggest that is a training issue, not a regulatory or legislative one. In particular, the acquisition of commercial items under the GSA schedules would be an appropriate subject for better training and better management of that system to ensure users are seeking the competition now required. More rules will remain ineffective without better training and management.

Documentation Presented Previously to the AAP by Industry: (WHAT ELSE?)

Acquisition Reform Working Group 2005 Legislative Proposals to Congress, March 2005.

"Removing Federal Services Acquisition Barriers And Balancing Public and Private Interest", Contract Services Association, Multi-Association Task Force Report on Service Contracting, May 17, 2005.

Information Technology Association of America, comments regarding the use of time and materials contracting, August 18, 2005.

Professional Services Council, November 18, 2005.